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No. 84-1143

In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES F. O'BROCTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly rejected petitioner's contention that the district court had interfered with his attempt to persuade the jury of his innocence by characterizing his defense as "spurious."

2. Whether evidentiary rulings by the trial court prevented petitioner from fully asserting his good-faith defense.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Quercia v. *United States*, 289 U.S. 466 ..... 5, 6

Thor Power Tool Co. v. *Commissioner*, 439 U.S. 522 6

United States v. *Abel*, No. 83-935 (Dec. 10, 1984) 8

Statutes, regulations and rule:

18 U.S.C. 371 2

26 U.S.C. 63(a) 6

26 U.S.C. 7206 2

26 U.S.C. 7206(a) 3

26 U.S.C. 7206(2) 3

Treas. Reg. :

§ 1.61-3 6

§ 1.47-1 6

Fed. R. Crim. P. 30 7

Miscellaneous:

Webster's Third New International Dictionary (1976) 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 745 F.2d 263. The judgment of conviction entered by the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1984. On November 20, 1984, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including December 31, 1984, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on one count of conspiring to defraud the United States by impeding the Internal Revenue Service, in

violation of 18 U.S.C. 371, and on three counts of subscribing to, or willfully assisting in the preparation of, false corporate income tax returns, in violation of 26 U.S.C. 7206. Petitioner was sentenced to concurrent prison terms of five years on the conspiracy count and three years on each of the substantive counts; that sentence was suspended and petitioner was placed on probation for a total of five years. He was required to perform public service activity without pay and was fined $25,000 (C.A. App. v). The court of appeals affirmed, one judge dissenting (Pet. App. 1a-30a).

Petitioner was president of Frank J. O'Brocta Salvage, Inc., which bought and sold scrap metal (C.A. App. 399a). In his capacity as president, petitioner was responsible for the company's books and for the preparation of its income tax returns. During 1975-1978, petitioner's company regularly sold scrap metal to Penn Iron and Metals Company, another scrap dealer (Pet. App. 3a). On numerous occasions, petitioner caused Penn Iron to remit payment in cash or by check made out to a fictitious payee; on such occasions, petitioner failed to have the payment recorded on his company's books and did not bring it to the attention of the accountants who prepared the company's tax returns (*ibid.*; C.A. App. 119a, 209a, 247a-248a, 412a, 449a). As a result, the company's tax returns failed to reflected gross receipts of $90,469 for 1976, $74,820 for 1977, and $92,788 for 1978 (C.A. App. 119a-124a, 208a-214a, 328a, 448a).

Petitioner's primary defense was that his failure to report the gross receipts was not willful. He claimed that he had used the money from the unreported receipts to make purchases (likewise unreported) of scrap metal on his company's behalf. Petitioner testified that he thought the unreported receipts and unreported purchases would cancel each other out, that his failure to report the receipts would thus not affect the computation of tax liability, and hence

that his false statements on the company's tax returns were not improper. C.A. App. 412a-413a, 419a-420a.

During the IRS investigation of the case, petitioner altered the daily journals in which his company's cash purchases were recorded in an attempt to support his claim that the unreported gross receipts had been used to buy additional scrap metal (C.A. App. 266a-269a, 417a, 445a-447a). He also substituted new calculator tapes for those that had been attached to the company's books by its accountants when they made the calculations underlying the company's original reporting of its cash purchases (C.A. App. 125a-130a, 220a-223a). Petitioner admitted at trial that the alterations he made were arbitrary in amount (C.A. App. 447a).

At the close of petitioner's trial, the district court gave the jury elaborate instructions on the issue of willfulness (Pet. App. 5a-8a & n.3). It emphasized that the substantive crimes with which petitioner was charged did not require the government to prove that he had willfully understated the company's tax liability, but only that he had willfully made or subscribed under penalties of perjury returns that contained false statements as to a material item (26 U.S.C. 7206(1) and (2)). The instructions contained the following passage (Pet. App. 5a):

> There is a particular statute or two particular sections of the same statute that make the giving of the false information a violation of the law, regardless of whether there was any income tax to be paid or due, regardless of whether the United States suffered any loss or not. No pecuniary loss, no monetary loss, need be suffered by the United States. The violation of the statute is complete if it is shown that the Defendant deliberately and with knowledge that it was contrary to law gave a false account of any material item on the report. Gross receipts are material. There has been an

> admission here that gross expenditures were also falsely reported and an argument made that they should cancel each other out, and that is spurious, of course, in that it omits the consideration of inventory. If money is paid out to acquire goods, then those goods go into inventory, and so a false statement of any one of these things throws all the rest of the material on the return out of whack and unable to be understood.

Petitioner objected to the court's use of the word "spurious," whereupon the judge gave the following supplemental instruction (Pet. App. 13a-14a):

> I have said, ladies and gentlemen, that the false statements on the returns and the false entries in the books are not in dispute. They have been admitted. The only question left is the question of mental state; that is, the willfulness . . . .
>
> With respect to the court's comment on whether or not the receipts of money and the expenditures of money and cash — I may have used the word "spurious." That is solely a conclusion that the court drew. You have heard the testimony of the Government's expert witness with respect to what the effect of the misstatement of both of those are on other matters here. The opinion of the court there that there is inventory is solely the opinion of the Court and does not bind the jury in any way as to whether or not that would be a logical contention to make, that these two cancel each other out.

Petitioner did not object to this supplemental instruction or request that a further curative instruction be given to the jury (Pet. App. 14a-15a). The jury found petitioner guilty on each count.

The court of appeals affirmed, one judge dissenting (Pet. App. 1a-30a). In assessing the propriety of the district court's remarks to the jury, the court of appeals noted (*id.* at 9a) the settled principle that a judge in charging the jury "is not limited to instructions of an abstract sort," but possesses the discretion, "whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important" (*Quercia* v. *United States*, 289 U.S. 466, 469 (1933)). The judge, moreover, "may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination" (*ibid.*). The court of appeals noted that there is no "bright line" separating appropriate comments from inappropriate ones (Pet. App. 10a), and observed that its prior decisions had employed a "sliding scale approach" in which it had "considered four factors: the materiality of the comment, its emphatic or overbearing nature, the efficacy of any curative instruction, and the prejudicial effect of the comment in light of the jury instruction as a whole" (*ibid.*). Applying this test to the instruction in question (*id.* at 14a), the court concluded:

> [W]hatever the limits of permissible judicial comment may be, the trial judge's comment in the case at bar did not transcend the boundary. While the Court does not endorse the judge's use of the word "spurious," it also does not find that under the test utilized today the inclusion of this one word amounted to reversible error.

One judge dissented (Pet. App. 19a-30a), believing that the majority had misapplied its four-factor test to the facts of this case.

ARGUMENT

The decision below is correct. Petitioner does not allege (nor is there) a conflict among the circuits or with any

decision of this Court on any of the questions presented. Petitioner does not challenge the legal principles employed by the court below, but only the application of those (well-settled) principles to this particular case. Such fact-bound questions do not warrant this Court's review.

1. Petitioner's principal contention (Pet. 13-21) is that the court of appeals, having correctly enunciated a four-factor test for evaluating the district court's remarks to the jury, "did not properly apply the test which it set forth" (Pet. 19). This contention is meritless. To begin with, it is by no means clear that the judge's use of the word "spurious" was intended by him, or would have been understood by the jury, as a "comment upon [the] evidence" (*ibid.*) at all. That portion of the instruction was simply a correct statement of the law with respect to petitioner's argument that unreported gross receipts and unreported purchases will cancel each other out in the computation of tax liability. Under the income tax laws, it is "cost of goods sold," not purchases of merchandise, that is to be offset against gross receipts; and inventory must be taken into account in computing "cost of goods sold." See 26 U.S.C. 63(a); Treas. Reg. §§ 1.61-3, 1.471-1; *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 530 n.9 (1979).

Even if one regards the district court's remark as a comment upon the evidence, moreover, it was not improper under the standards set forth by this Court in *Quercia* v. *United States, supra.* As the court of appeals noted (Pet. App. 13a), the challenged portion of the instruction was not directly material to petitioner's defense. His defense was that he entertained a good-faith belief that his false statements about his company's gross receipts were not wrongful because they would make no difference on the "bottom line" tax computation. The district court, to be sure, informed the jury that petitioner's claimed belief was not correct. But the judge never suggested a personal opinion

that petitioner did not hold that belief in good faith, or that the erroneousness of his belief disentitled him to raise his good-faith defense.

The court of appeals also correctly concluded (Pet. App. 13a-14a) that the challenged language was unlikely to have misled the jury when considered in light of the charge as a whole, particularly the curative instruction given in response to petitioner's objection. The district court repeatedly emphasized (see Pet. App. 5a-8a) that petitioner could not be convicted unless he knew what he was doing and knew that it was contrary to law. This repeated emphasis ensured that the jury would not confuse petitioner's actual state of mind, on the one hand, with the legal correctness of his belief on the other.

As the court below properly noted (Pet. App. 14a), finally, the district court's use of the word "spurious" was not unduly emphatic. In the context of the instruction as a whole, the word bore no pejorative connotation, but indicated only that the defense proposition as to offsetting understatements of receipts and purchases was "faulty in reasoning or conclusion." *Webster's Third New International Dictionary* 2212 (1976). The court in its supplemental instruction eliminated any undue emphasis the word may have carried, dismissing its own view as "solely a conclusion that the court drew" (Pet. App. 14a) and instructing the jury to decide for itself on the basis of the evidence whether petitioner's claim that he entertained this erroneous belief was credible. Although use of the word "spurious" may have been "ill-advised" (*ibid.*), the court of appeals properly concluded that "[t]he use of one ill-advised word within an entire charge to the jury does not, in this context, constitute reversible error" (*ibid.*).[1]

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[1]There is no need for this Court to consider petitioner's related contention (Pet. i, 21-23) that the court of appeals erred in faulting him under Fed. R. Crim. P. 30 for neglecting specifically to object to the

2. Petitioner also contends (Pet. 23-24) that the district court erroneously prevented him from "fully asserting" his good-faith defense by limiting certain lines of questioning, generally on grounds of irrelevance and repetitiveness. But "[a] district court is accorded wide discretion in determining the admissibility of evidence." *United States* v. *Abel*, No. 83-935 (Dec. 10, 1984), slip op. 9. The court of appeals has fully reviewed the district court's exercise of its discretion (Pet. App. 16a-18a) and concluded that that discretion was not abused. Petitioner does not allege a conflict among the circuits on this score (see Pet. 23-24), and this fact-bound issue does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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effectiveness of the district court's curative instruction. See Pet. App. 14a-16a. That part of the decision below was dictum, since, as petitioner concedes (Pet. 19), the court of appeals did assess the sufficiency of the supplemental instruction in conducting its four-pronged balancing test. See Pet. App. 13a-14a.

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